NOTES

The Columbia Law Review takes pleasure in announcing the election of officers for the year 1922-23: Editor-in-Chief, William K. Laws; Secretary, William D. Fuguet; Business Manager, A. Holly Patterson. The following appointments have been made: Note Editor, William V. Goldberg; Decisions Editor, Kenneth B. Low; Associate Decisions Editor, George E. Netter; Book Review Editor, Henry Coster.

To the 1923 Board the retiring Editors wish to express their thanks for a year of most interesting and pleasant collaboration, their best wishes for the year to come, and their sincere conviction that the Review, during that year, will be administered and published in accordance with its best traditions and highest standards.

Errata.—On pages 391 and 392 of the April number of the Columbia Law Review it was made to appear, through an error of the printer, that Professors Chester A. Vernier and Charles A. Huston, both of the Stanford University Law School, who reviewed respectively Tiffany, *A Handbook on the Law of Persons and Domestic Relations* (2d ed. 1921), and Schaub and Isaacs, *The Law in Business Problems* (1921), wrote from the "Standard University Law School." The Editors of the Columbia Law Review hasten to express their regret for the occurrence of this misleading error.

SUBSCRIPTIONS.—The third year class has just completed a campaign among its members for subscriptions to the Columbia Law Review. Over eighty-five percent of the group solicited subscribed. The Review desires to express its sincere appreciation to the third year class for such a generous manifestation of its support and to the class President, Mr. William J. Gilligan, and his committee for their excellent services so unselfishly given. The committee was composed of the following men: S. Berzin, Percy Cowan, R. C. Emery, H. Kalman, G. Krause, H. A. Koenig, M. Lustig, D. Mandel, A. E. McDougall, W. B. Moore, A. Moritz, J. W. Osborne, Collier Platt, F. M. Porfilio, Clarence Sager, M. J. Shevlin, W. I. Siegel, J. S. Sinclair, Frank Veith.

CANCELLATION OF A MORTGAGE BARRED BY THE STATUTE OF LIMITATIONS.[1]—The Statute of Limitations,[2] designed to bring "repose" and discourage the prosecution of stale claims, has possibly stirred up as much litigation as it has prevented. A typically vexatious problem is presented in the recent case of *Yarlott* v. *Brown* (Ind. 1922) 133 N. E. 613.[3] X mortgaged property to the defendant as security

[1] Few jurisdictions still apply the common law doctrine of mortgages. This note, therefore, is restricted to lien theory jurisdictions.

[2] Throughout this note, except where otherwise indicated, the only type of case considered, is that in which the Statute runs against the remedy, leaving the right intact. This is to be distinguished from the creation of prescriptive rights in realty or personalty by the lapse of time. *Bicknell* v. *Comstock* (1885) 113 U. S. 149, 152, 5 Sup. Ct. 399; *Chapin* v. *Freeman* (1886) 142 Mass. 383, 8 N. E. 128; but see *Miller* v. *Dell* [1891] 1 Q. B. 468, 471.

[3] This is the citation of the report on the rehearing. The facts are taken from the prior decision in (Ind. 1921) 132 N. E. 599.

for a debt. The mortgage was recorded. After the Statute had run against the debt, X conveyed the property to the plaintiff who had actual notice of the mortgage, and deducted a certain sum to pay expenses for quieting title. It was held that the mortgagor's grantee, in an action against the mortgagee, could cancel the mortgage as a cloud on his title without paying the debt.

The instant holding is a determination of three separate propositions. In the first place, it is a decision that when the Statute runs against a debt, it also bars the mortgage security; secondly, that a barred mortgage is a cloud on title; thirdly, that a purchaser of land subject to a mortgage after the mortgage was barred may cancel the indenture without paying the debt. The authorities are divided over the first proposition. Some emphasize the fact that a mortgagee really has two remedies, one against his debtor and one against the land, and hence conclude that though six years may bar the former, yet as the latter depends on a sealed instrument, the limitation is twenty years.[4] Other jurisdictions stress the incidental character of the mortgage, since it is mere security for the debt.[5] When the debt is barred, they conclude that the security must fall with it. Without evaluating either position, it is clear that the only result of the controversy is to accelerate or retard the inception of the other two problems.[6] In regard to them it is submitted that the decision in the instant case is unsound. A mortgage barred by the Statute of Limitations is generally held not to be a cloud on title. The typical definition of a cloud is an instrument purporting to affect the title to realty, but which is actually invalid.[7] A deed given under a sheriff's execution sale where the land purported to be conveyed was not the judgment debtor's, is an instance in point.[8] A deed executed under duress is another.[9] The holder of the instrument has no rights against the land. The situation of a mortgagee whose right to foreclose is barred, is entirely different. While he lacks an enforcible claim to the land, he is under a peculiar liability[10] with reference to it. If the mortgagor acknowledges in writing that he owes the debt, the mortgage is revived.[11] A similar result follows the payment of any part of the principal[12] or interest.[13] In those jurisdictions which allow a separate remedy on the mortgage, it may be that the mortgage might be revived independently of the debt.[14] Where, as in the instant case, rights of third parties have supervened, the original mortgagor generally will not be allowed to prejudice his grantor's rights by waiving the Statute.[15] It would not follow, however, that the grantee could not waive it.[16] The mortgage continues a lien on the premises,

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[4] *Hulbert* v. *Clark* (1891) 128 N. Y. 295, 28 N. E. 638; *Roch* v. *Sanborn Land Co.* (1908) 135 Wis. 354, 115 N. W. 1102 (*semble*).

[5] *Newhall* v. *Sherman, Clay & Co.* (1899) 124 Cal. 509, 57 Pac. 387; see *Hiberian Banking Ass'n* v. *Commercial Nat. Bk.* (1895) 157 Ill. 524, 527, 41 N. E. 919.

[6] Practically, the difference is all important; the longer the period of limitation, the less probability is there of a right of action being barred.

[7] *Rigdon* v. *Shirk* (1889) 127 Ill. 411, 19 N. E. 698.

[8] *Linnell* v. *Battey* (1891) 17 R. I. 241, 21 Atl. 606.

[9] *Merchants' Bk.* v. *Evans* (1873) 51 Mo. 335.

[10] The term "liability" is used in the Hohfeldian sense, indicating that the mortgagee's rights now barred are subject to revival.

[11] *Murphy* v. *Coates* (1881) 33 N. J. Eq. 424.

[12] *Clift* v. *Williams* (1899) 105 Ky. 559, 51 S. W. 821.

[13] *Gillilan* v. *Fletcher* (1907) 80 Neb. 237, 114 N. W. 161; *McLane* v. *Allison* (1899) 60 Kan. 441, 56 Pac. 74.

[14] The discussion in the cases that consider the mortgagee as possessing two remedies, favors the conclusion that they would allow a debtor to revive one and not the other. The obligations of the debtor under the remedies are not identical. See *Cowan* v. *Mueller* (1903) 176 Mo. 192, 198, 75 S. W. 606.

[15] *Contra, Barrett* v. *Prentice* (1884) 57 Vt. 297.

[16] *McLane* v. *Allison, supra,* footnote 13 (*semble*).

though it is unenforcible.[17] If the grantee takes the property before the lien has been barred, he steps into the mortgagor's shoes, subject to all his rights and liabilities.[18] Some states, by statute, have provided that where a lien has been barred by the Statute of Limitations it shall be "extinguished."[19] Courts in these states have construed such a law as going to the right and not merely to the remedy of the lienor. Hence, in these jurisdictions, a mortgage-lienor loses all his rights, and the deed is a cloud on title.[20] But where the statute is not so construed the mortgage is not a cloud, for legal rights created by it are still binding; therefore, it should not be cancelled.[21]

Even assuming a barred mortgage to be a cloud on title, it seems inequitable to allow cancellation without payment.[22] As between the original parties the great weight of authority holds that payment is a condition precedent to cancellation.[23] The reason given is that the moral obligation to pay remains after the Statute has run. If this position be sound, if the object be to prevent the mortgagor from benefiting at the mortgagee's expense, the instant decision is plainly unwarranted. By allowing the mortgagor to sell to a third party who realizes that he takes free of all incumbrance and may cancel all record clouds, the mortgagor benefits almost to the same extent as he would if he could cancel the mortgage directly. The rule is that a grantee of a mortgagor who takes for the purpose of clearing the title will not succeed without payment.[24] How is that distinguishable from the instant case? The economic result is the same. The principal case emphasizes the evil; the grantee deducted the cost of lawyers' fees for the purpose of cancelling the mortgage. In short, the situation is precisely the same as though the mortgagor himself or a grantee for the purpose, were to ask for cancellation.[25]

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[17] This would follow the application of the oft-repeated maxim that the Statute bars the remedy, not the right. See *Myer* v. *Beal* (1873) 5 Ore. 130, 131; *Cowan* v. *Mueller, supra,* footnote 14, p. 198.

[18] *Hughes* v. *Edwards* (U. S. 1824) 9 Wheat. 489; see *Faxon* v. *All Persons, etc.* (1913) 166 Cal. 707, 721, 137 Pac. 919.

[19] *E. g.,* Cal. Civ. Code (1915) § 2911: "A lien is extinguished by the lapse of the time within which, under the Code of Civil Procedure, an action can be brought upon the principal obligation." A mortgage is a lien in California. *Ibid.* § 2877.

[20] *Faxon* v. *All Persons, etc., supra,* footnote 18; *cf. Archambau* v. *Green* (1875) 21 Minn. 520. "If the claim sought to be removed is valid . . . it cannot be said to be a cloud." *Rigdon* v. *Shirk, supra,* footnote 7, p. 412.

[21] In this discussion no point is made of the conditions the satisfaction of which in different jurisdictions necessarily precedes cancellation. Many courts follow the New York rule that if the instrument is invalid on its face, or if, in proving the instrument, the holder would necessarily have to introduce evidence of its invalidity, cancellation will not be allowed. *Washburn* v. *Burnham* (1875) 63 N. Y. 132. Other jurisdictions will cancel any invalid instrument that affects the marketability of title. *E. g., Linnell* v. *Battey, supra,* footnote 8. In between the two fall other variations. *E. g., Lytle* v. *Sandifur* (1890) 93 Ala. 396, 9 So. 260.

[22] The discussion is simply an exemplification of the maxim that "he who seeks equity, must do equity."

[23] *Provident, etc. Ass'n* v. *Schwertner* (1914) 15 Ariz. 517, 140 Pac. 495; *Tracy* v. *Wheeler* (1906) 15 N. Dak. 248, 107 N. W. 68; *contra, Kingman* v. *Sinclair* (1890) 80 Mich. 427, 45 S. W. 187.

[24] *Barney* v. *Chamberlain* (1910) 85 Neb. 785, 124 N. W. 482 (*semble*).

[25] At least one jurisdiction has gone further than the principal case. A junior mortgagee was permitted to cancel the senior mortgage against which the Statute of Limitations had run. It was not stated whether the junior mortgage was made before or after the Statute had run. *Fox* v. *Blossom* (C. C. 1879) 17 Blatchf. 352. If it was taken before, it was taken subject to the prior mortgage, and accordingly the junior mortgagee, like the mortgagor, should not be allowed to cancel without paying. *Cf. Miller* v. *Coxe* (1903) 133 N. C. 578, 45 S. E. 940.

The grantee in the instant case had actual notice. But direct notice is unnecessary. If the mortgage is recorded, the policy of the recording acts is to charge the "world" with notice.[26] On their face mortgages do not indicate whether or not the Statute has run against them. Though a considerable number of years has elapsed since the debt became due, partial payment or some other acknowledgment may have revived the remedy or started the Statute running anew. If a grantee is willing to take the risk of buying property with an outstanding mortgage, it is only fair that, if he desires to have it cancelled, he should pay the debt.

The cases generally reach the preferable result. They ignore the fact as to whether the person seeking the cancellation bought the premises prior or subsequent to the bar.[27] It is held equally immaterial whether the mortgagee retained the deed, or sold it before or after it was barred.[28] There is no objection to trading in a legal liability to become invested with an enforcible claim. The same reasoning, however, which influenced some courts to consider a barred mortgage a cloud on title, should have persuaded them that it might be cancelled without payment.[29] If a lien is "extinguished" by statute, the instrument evidencing the voided obligation should be cancelled. A vigorous dissent in a well-known case[30] is based on much the same grounds: "Viewed from a practical standpoint, the rule as established by the majority seems to me absurd. The mortgage is an unenforcible one, because public policy will not permit any inquiry into the merits of a claim. It must remain, however, as an eternal cloud on the title, unless the owner of the property will consent to litigate the merits notwithstanding the statute, or pay what the mortgagee sees fit to demand." The answer would seem that it is not inequitable to require the mortgagor to repay his debts.

The desire of the courts to work out justice has exemplified itself in another group of cases. Suppose A mortgages to B, and B forecloses and buys at the judicial sale, entering into possession. For some reason, perhaps lack of proper notice, the foreclosure is void. Assume that before a new foreclosure can be had, the mortgage to B is barred by the Statute of Limitations, and that, therefore, B may not foreclose. A, nevertheless, may neither eject B nor cancel the deed, unless he pays the barred mortgage debt.[31] In other words, while B can have no affirmative relief on the mortgage, A will not be given any against it, unless he does equity, and equity is payment. The reason usually given is that the purchaser has the rights of a mortgagee in possession. His position seems like that of a pledgee against whose debt the Statute of Limitations has run, and who nevertheless may retain the pledged article until payment. The two situations, however, are clearly disparate. In the typical case of a mortgagee in possession or a pledgee, the debtor agrees that the creditor shall retain the security until payment; entry under a void foreclosure sale is clearly without the mortgagor's consent. If the mortgagee is allowed to retain possession, it is only because of his strong equitable position.

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[26] *Murphy* v. *Coates, supra,* footnote 11.

[27] *Cazara* v. *Orena* (1889) 80 Cal. 132, 22 Pac. 74.

[28] *D. S. B. Johnson Land Co.* v. *Mitchell* (1915) 29 N. Dak. 510, 151 N. W. 23 (mortgage purchased after mortgage had become barred); *Keller* v. *Souther* (1913) 26 N. Dak. 358, 144 N. W. 671 (property purchased after mortgage was barred).

[29] *Contra, Faxon* v. *All Persons, etc., supra,* footnote 18.

[30] *Tracy* v. *Wheeler, supra,* footnote 23.

[31] *Hall* v. *Hooper* (1896) 47 Neb. 111, 66 N. W. 33; *Burns* v. *Hiatt* (Cal. 1906) 87 Pac. 196; see *Faxon* v. *All Persons, etc., supra,* footnote 18, pp. 717 *et seq.; contra, Herrmann* v. *Cabinet Land Co.* (1916) 217 N. Y. 526, 112 N. E. 476.